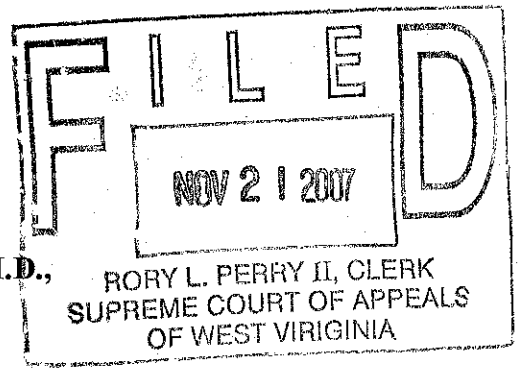
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 070444



RICHARD C. RASHID, M.D.,

Appellant,

v.

MUHIB S. TARAKJI, M.D.,

Appellee.

BRIEF OF APPELLEE MUHIB S. TARAKJI, M.D.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER TRIBUNAL

On July 5, 2001, pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure, the Circuit Court of Kanawha County, West Virginia, dismissed civil action number 97-C-725 filed on March 14, 1997 by the appellant, Richard C. Rashid, M.D. ["Rashid"], against the appellee, Muhib S. Tarakji, M.D. ["Tarakji"], for failure to remit the court's fee to maintain the action on its docket. Rather than take any action to challenge the dismissal, Rashid waited almost four years and re-filed the action in the Circuit Court on March 21, 2005. Rashid voluntarily dismissed the later suit upon acknowledging that the re-filed action was barred by the doctrine of *res judicata*.

Following the dismissal of both actions, Rashid filed his Motion to Reinstate the original action. Rashid filed the motion twenty-six terms of court after the original action was filed and thirteen terms of court after the Circuit Court dismissed the original action under Rule 41(b). Rashid argued that the mistake and fraud of his prior attorneys was sufficient to fall within the "good cause" exception to the three term limit to move for reinstatement as articulated by this Court in Arlan's Dept. Store of Huntington, Inc. v. Conaty, 162 W.Va. 893, 253 S.E.2d 522 (1979). Rashid also argued, for the first time, that his prior counsel did not receive notice of the probable dismissal of the action before it was dismissed as required by Rule 41(b). However, the Circuit Court recognized that this Court has yet to find "good cause" sufficient to overcome the three term limit established by Rule 41(b). The Circuit Court also recognized that even if Rashid's prior counsel did not receive the notice, although the docket noted that the notices were sent, this does not overcome the fact that Rashid did not move for reinstatement within three terms of court following the dismissal. Accordingly, the Circuit Court denied Rashid's Motion to Reinstate by the Order dated September 27, 2006 [the "Order"].

On February 12, 2007, Rashid filed in this Court a petition to appeal the Order. This Court granted Rashid's petition on September 20, 2007 and Tarakji timely files his brief of Appellee in response to Rashid's brief of Appellant.

FACTS

In the Order, the Circuit Court issued findings of fact. Although Rashid asserts that he did not receive the March 30, 2001 letter noticing the probable dismissal of the original action from the Circuit Court under Rule 41(b), Rashid does not dispute the events leading up to his filing of the Motion to Reinstate as contained in the Order. The Order sets forth the following findings of fact:

> 1. On March 14, 1997, Dr. Rashid filed his Complaint against Dr. Tarakji in this Court. The Complaint was filed on Dr. Rashid's behalf by counsel Bradley Sorrells, Esq., and Scott Segal, Esq. The Court's electronic docket identifies Mr. Segal as counsel for Dr. Rashid. The cover of the paper file in the Kanawha County Circuit Court Clerk's office also identifies Mr. Segal as Dr. Rashid's counsel.
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> 2. Dr. Rashid alleges in the Complaint that Dr. Tarakji, an ophthalmologist formerly working as an independent contractor in Dr. Rashid's ophthalmology practice, formed his own medical practice through the use of unauthorized trade secrets, which were misappropriated from Dr. Rashid through the use of fraud. Complaint at Introduction and Count II. Moreover, Dr. Rashid alleges that Dr. Tarakji's practice was formed and operated in direct violation of a non-competition agreement with Dr. Rashid. Id. at Introduction and Count I.
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> 3. On December 8, 1997, Dr. Tarakji filed his answer to the Complaint and asserted a counterclaim against Dr. Rashid. Dr. Rashid filed his answer to Dr. Tarakji's counterclaim on February 2, 1998.
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> 4. On November 30, 1998, and April 10, 2000, respectively, Dr. Rashid served nearly identical first and second request for production of documents to Dr. Tarakji. Dr. Rashid then provided Dr. Tarakji with an open-ended extension to answer the first request on December 1, 1998 and a six-month extension for the second request on April 11, 2000. No action was taken in the case thereafter.
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> 5. According to the Court's docket, two letters were sent on March 30, 2001, informing the parties, through counsel, that the action would be dismissed unless twenty dollars was remitted to the Kanawha County Circuit Court Clerk by May 1, 2001, pursuant to W.Va. Code § 59-1-11(b) [the "notice letter"]. The notice letter stated further

that failure to remit the twenty dollars by May 1, 2001, would result in the referral of the case to the Court for dismissal pursuant to Rule 41(b). The notice letter is dated March 30, 2001, and lists the current action's civil action number on the top right corner. Furthermore, the notice letter has "10 – 11" handwritten on the bottom right hand corner on both copies submitted to the Court from Dr. Rashid and Dr. Tarakji. Lines 10 – 11 of the computer docket identify the following action as occurring on March 30, 2001: "3/30/01 #NOT OF THREE YEAR RULE."

6. The current action was subsequently dismissed by order of July 5, 2001, as a result of Dr. Rashid's failure to remit twenty dollars to the Circuit Court Clerk by May 1, 2001.

7. On January 28, 2003, Mr. Sorrells, on Dr. Rashid's behalf, requested Dr. Tarakji's tax returns for the years 1995, 1996 and 1997 in order to determine whether to reassert the dismissed claims. Dr. Tarakji's counsel, Jeffrey M. Wakefield, Esq., responded to Mr. Sorrells by letter dated January 31, 2003, and informed Mr. Sorrells that the action had been dismissed and any new lawsuit filed by Dr. Rashid would be barred under the doctrine of *res judicata*. Moreover, Mr. Wakefield included the text of Rule 41(b) and informed Mr. Sorrells that the three term limit in which to reinstate the action for "good cause" had lapsed.

8. On March 21, 2005, Dr. Rashid filed a new complaint in this Court, identical to the complaint filed in the current action, as civil action number 05-C-597. Mr. Sorrells and Mr. Segal were identified as Dr. Rashid's counsel. Dr. Tarakji filed a motion to dismiss on grounds of *res judicata* after which Mr. Segal, on Dr. Rashid's behalf, agreed to the dismissal of the action. An order reflecting the dismissal was entered on November 30, 2005.

9. On March 22, 2006, thirteen terms of court after the current action was dismissed, Dr. Rashid, through counsel, R. Edison Hill, Esq., filed a motion to reinstate the current action. Dr. Rashid argued that reinstatement was proper under the law of Arlan's Department Store v. Conaty, 162 W.Va. 893, 253 S.E.2d 522 (1979) ["Arlan's"], based upon mistake and/or fraud of Mr. Sorrells. Moreover, Dr. Rashid claimed that the dismissal was invalid under Rule 41(b) since Mr. Sorrells and Mr. Segal were not provided with the notice letter assessing the twenty dollar fee in order to maintain the current action on the Court's docket. Dr. Rashid attached affidavits as evidence of fraud and/or mistake as well as Mr. Segal's failure to receive the notice letter prior to entry of the dismissal order on July 5, 2001.

10. Dr. Rashid submitted the affidavit of Mr. Segal as evidence that Mr. Segal did not receive the notice letter prior to the entry of the dismissal order. Mr. Segal states that he received the Court's dismissal order on July 20, 2001, along with the notice letter. Mr. Segal requested another member of his firm, Mark R. Staun, to contact Mr. Sorrells regarding the dismissal. Mr. Staun later informed Mr. Segal that Mr. Sorrells was going to take care of the matter. Mr. Segal states further that he again became reacquainted with the case in April 2005 after receiving Dr. Tarakji's motion to dismiss civil action

number 05-C-597. In other words, Mr. Segal made no effort to reinstate the current action for lack of notice or otherwise following his receipt of the dismissal order on July 20, 2001.

11. Dr. Rashid also submitted the affidavit of Earlena G. Titta as evidence that Mr. Segal did not receive the notice letter prior to the entry of the dismissal order. Ms. Titta's affidavit consists of Ms. Titta's personal account of a telephone conversation between herself and an unnamed employee of the Circuit Court Clerk's office regarding the sending of the notice letter. Dr. Tarakji has moved to strike the affidavit as impermissible hearsay testimony under Rule 802 of the West Virginia Rules of Evidence.

12. Dr. Rashid submitted his own affidavit stating that he was advised by Mr. Sorrells prior to 2005 that the current action had been dismissed, but that Mr. Sorrells would re-file the current action before March 23, 2005 – the date the ten-year statute of limitations applicable to contracts expired.

13. Dr. Rashid submitted the affidavit of his son and office manager, Charles Rashid, in which Charles Rashid stated that he recalled conversations with Mr. Sorrells following the dismissal of the current action. Mr. Sorrells informed Charles Rashid that the current action was going to be re-filed within the applicable ten-year statute of limitations. Charles Rashid also recalled Mr. Sorrells informing him that there was no difference between "re-filing" and "reinstatement."

14. Dr. Rashid submitted the affidavit of Mr. Staun in which Mr. Staun stated that he had called Mr. Sorrells on Mr. Segal's behalf following the dismissal at which time Mr. Sorrells stated that he would be taking care of the matter. Mr. Staun stated that he had several conversations with Mr. Sorrells between 2001 and 2005 where Mr. Sorrells informed Mr. Staun that the Rashid matter was being taken care of.

15. Dr. Rashid did not submit an affidavit or any other evidence from Mr. Sorrells.

16. On April 19, 2006, Dr. Tarakji filed his response in opposition to Dr. Rashid's motion to reinstate. In his response, Dr. Tarakji noted that Dr. Rashid failed to move for reinstatement within three terms of court following the dismissal of the current action as required by Rule 41(b). In so doing, Dr. Tarakji presented conflicting evidence that the notice letter was sent prior to the entry of the dismissal order. Dr. Tarakji also pointed out that Mr. Segal became aware of the dismissal and his alleged failure to receive the notice letter on July 20, 2001, when he received the dismissal order, but failed to move for reinstatement within three terms of court thereafter.

Moreover, Dr. Tarakji disputes Dr. Rashid's assertion that Mr. Sorrells' conduct rises to the level of fraud and/or mistake sufficient to overcome Mr. Sorrells or Mr. Segal's failure to move for reinstatement within three terms of court as articulated in Arlan's.

Order at ¶¶ 1-16. Rashid disputes ¶ 17 of the Order which provides that, "Dr. Rashid did not file a memorandum replying to Dr. Tarakji's response in opposition to the motion to reinstate." Brief of Appellant at p. 2. However, the Circuit Court requested proposed orders, which were submitted to the Circuit Court before Rashid filed his reply to Tarakji's response to Rashid's Motion to Reinstate.

Based on these findings of fact, the Circuit Court denied Rashid's Motion to Reinstate. Relying on Rule 41(b) and case law from this Court, including Arlan's, the Circuit Court held that Rashid failed to show "good cause" to overcome the three term limit to move for reinstatement since the "good cause" exception was not intended to reinstate cases where counsel was ignorant as to the Rules of Civil Procedure, but rather extreme cases. Order at p. 7. The Circuit Court also held that Sorrells' statements to Rashid regarding re-filing the action did not constitute fraud since Sorrells told Rashid that the action would be re-filed and the action was indeed re-filed. Id. at pp. 9-10. Furthermore, the Circuit Court concluded that even if Segal did not receive the notice letter prior to dismissal, this did not overcome the fact that neither Segal nor any other counsel for Rashid moved to reinstate the action within three terms of court following the dismissal. Id. at pp. 10-11. As the Circuit Court stated in the Order, "[r]ather, Mr. Segal and Mr. Sorrells allowed three terms of court to lapse either through ignorance of the law or sheer neglect of the case and, in fact, ... thirteen terms of court lapsed before the any remedy was sought for the alleged lack of notice." Id. at p. 11. The Circuit Court also concluded that Tarakji would suffer prejudice if the action was reinstated due to the nine year lapse in time since the action was filed. Id.

Tarakji asserts that the Circuit Court did not err in denying Rashid's Motion to Reinstate and submits this Brief of Appellee to urge the Court to affirm the Order denying Rashid's Motion to Reinstate.

ARGUMENT

Rashid is asking this Court to do something that it has never done before – reinstate an action previously dismissed under Rule 41(b) of the West Virginia Rules of Civil Procedure well after three terms of court have lapsed. This Court's review of the Circuit Court's denial of Rashid's Motion to Reinstate is based upon an abuse of discretion standard. As this Court stated in Belington Bank v. Masketeers Co., 185 W.Va. 564, 567, 408 S.E.2d 316, 319 (1991), "[i]n setting aside a non-suit and reinstating a case upon the trial docket, the trial judge may consider the evidence adduced prior to the non-suit and his action in so setting aside the non-suit and reinstating the case will not be disturbed on appeal unless a showing is made that he has abused his discretion." The record clearly reflects that the Circuit Court did not abuse its discretion and its ruling should be left undisturbed.

I. THE CIRCUIT COURT'S DISMISSAL ORDER OF JULY 5, 2001 IS NOT VOID AB INITIO.

Rashid's initial attempt to escape the consequence of failing for years to seek reinstatement of his civil action is to argue that the Order of July 5, 2001 was void ab initio because the procedure set forth in Dimon v. Mansey, 198 W.Va. 40, 479 S.E.2d 339 (1996), was purportedly not followed. But, regardless, Rashid cannot explain away why he did not timely move for reinstatement of the Order until thirteen terms of court after his counsel claims they first became aware of the dismissal. See Brief of Appellant at p. 5 (stating that Segal received notice of the dismissal on July 20, 2001); Segal Affidavit at ¶ 6-7. As such, this argument is not

well taken and betrays an implicit concession that Rashid cannot even remotely satisfy the "good cause" standard necessary to obtain reinstatement of his action.

The concept that a trial court's order is void ab initio has been embraced by this Court only in the limited instances where the record demonstrates that the Court was without authority or jurisdiction to act. See e.g., State ex rel. Brown v. Merrifield, 182 W.Va. 519, 389 S.E.2d 484 (1990) (court cannot exercise jurisdiction over a matter when there was no showing on the record that any party had properly instituted proceedings in court of record); State ex rel. Skinner v. Dostert, 166 W.Va. 743, 278 S.E.2d 624 (1981) (court order promulgated sua sponte which purports to control the judicial function in proceedings in a lower court was void ab initio when it provided that the prosecuting attorney was not authorized to seek a nolle prosequi in magistrate court without the consent of the circuit court); State ex rel. Preissler v. Dostert, 163 W.Va. 719, 260 S.E.2d 279 (1979) (also holding that court cannot exercise jurisdiction over a matter in which there is no showing on the record that any party has properly instituted proceedings in a court of record).

In this case there can be no contention that the Circuit Court lacked authority to dismiss an action when court costs were not paid as Rule 41(b) specifically permits such an action. Rather, Rashid suggests, contrary to the record below, that his counsel simply did not receive the notice of the impending dismissal if court costs were not paid. This circumstance does not render the Order of July 5, 2001 void ab initio. It, at best, suggests error in the entry of the Order which Rashid should have challenged in a timely and appropriate fashion – something which Rashid utterly failed to do. Even Dimon recognizes that the proper method for challenging a dismissal under Rule 41(b) is by either direct appeal or motion for reinstatement.

Rashid argues further that the Circuit Court's Dismissal Order of July 5, 2001 is void ab initio as "[t]he Clerk does not have the power to dismiss actions for nonpayment of fees" and "the matter of nonpayment of fees should have been 'referred' to the court" for dismissal under Rule 41(b). Brief of Appellant at p. 12. Contrary to Rashid's assertion, the Clerk of the Circuit Court of Kanawha County did not dismiss the underlying action. The Dismissal Order was signed and entered by the Honorable Louis H. Bloom, not the Clerk.[1] See Dismissal Order (7/5/01) attached to Tarajki's Response to Motion to Reinstate as Exhibit B. Therefore, Rashid's argument that the Dismissal Order is void ab initio because it was allegedly entered by the Clerk is without merit.

Furthermore, as demonstrated below, the Circuit Court properly declined to resolve the conflict between the docket entry showing that notice had been mailed and counsel's assertion that notice was not received. Instead, the Court focused its attention upon the fact that Rashid inexcusably failed to timely contest the dismissal – for a period exceeding a number of years – and could not demonstrate good cause to support the excessively tardy motion to reinstate when it was filed. Thus, the Dismissal Order of July 5, 2001 should be upheld.

II. RASHID CANNOT MAINTAIN ANY ACTION AGAINST TARAKJI ARISING OUT OF HIS FAILURE TO TIMELY CHALLENGE THE JULY 5, 2001 DISMISSAL.

A. Rashid waived his right to challenge the alleged failure to receive notice and the subsequent validity of the Dismissal Order.

The Dismissal Order was entered on July 5, 2001. There is no factual dispute that counsel for Rashid became aware of the dismissal of the action in July 2001. However, Rashid

[1] Rashid attempts to place blame on the Circuit Court by stating that "this 'mass notice' took place at a time when a newly-elected circuit judge was undertaking to clean-up an inherited and reportedly large civil case docket backlog." Brief of Appellant at p. 10. But this does not overcome the fact that the Court was authorized under Rule 41(b) to take such action. Moreover, this does not overcome the fact that Rashid failed to timely move for reinstatement despite being aware of the dismissal within three terms of court following the Court's entry of the Dismissal Order on July 5, 2001.

utterly failed to take advantage of the procedural mechanisms for disputing the entry of the Dismissal Order, including raising any contention that notice was not properly received. It was not until Rashid's attempt to re-file the action failed that Rashid challenged the entry of the Dismissal Order for any alleged lack of notice *thirteen* terms of court, over *four* years, after the dismissal. Therefore, Rashid has waived any right to dispute the entry or effect of the Dismissal Order and the Order should stand.

This Court has stated that "[w]aiver is the voluntary relinquishment of a known right." Dye v. Pennsylvania Cas. Co., 128 W.Va. 112, 118, 35 S.E.2d 865, 868 (1945). "To effect a waiver, there must be evidence which demonstrates that a party has intentionally relinquished a known right." Syl. pt. 1, Potesta v. United States Fid. & Guar. Co., 202 W.Va. 308, 504 S.E.2d 135 (1998). "This intentional relinquishment, or waiver, may be expressed or implied." Ara v. Erie Ins. Co., 182 W.Va. 266, 269, 387 S.E.2d 320, 323 (1989) cited in Potesta, Id. at 315, 142. "Waiver may be established by express conduct or impliedly, through inconsistent actions." Ara, Id. at 269, 323. "However, where the alleged waiver is implied, there must be clear and convincing evidence of the party's intent to relinquish the known right." Hoffman v. Wheeling Sav. & Loan Ass'n, 133 W.Va. 694, 713, 57 S.E.2d 725, 735 (1950) cited in Potesta, 202 W.Va. at 315, 504 S.E.2d at 142. The burden of proof is on the party asserting the waiver. Potesta, Id. at 315, 142.

Rashid admits that his counsel was aware of the dismissal of the action on July 20, 2001 – less than one month after the Dismissal Order was entered. See Brief of Appellant at p. 5 (stating that Segal received notice of the dismissal on July 20, 2001). At that time, Rashid's counsel would have been aware of the alleged lack of notice giving rise to their belief that the Dismissal Order was void ab initio, but did nothing about it despite that fact that Rule 41(b)

expressly sets forth that a party can challenge a Rule 41 dismissal within three terms of court. However, Rashid chose not to dispute the dismissal of his action, but rather to re-file an identical action almost four years later. After it became apparent that the re-filed action would be dismissed that Rashid decided to take issue with the Dismissal Order regardless of the fact that he intentionally relinquished the right to dispute the validity of the Dismissal Order by re-filing this action almost four years after the dismissal. It was not until this course of action failed that Rashid decided to dispute the validity of the Dismissal Order regardless of the fact that thirteen terms of court had passed, over four years, since the action was dismissed. Therefore, Rashid waived the right to dispute the validity of the Dismissal Order, for lack of notice or otherwise, notwithstanding the fact that over three terms of court passed before Rashid raised this issue.

Furthermore, Rashid's express conduct displays an intention to waive any right to challenge the alleged lack of notice. It defies logic that Rashid can be aware of the alleged notice deficiency and the validity of the Dismissal Order in general, but do nothing about it for five years. Under the doctrine of waiver, Rashid was duty bound to do something to address this perceived wrong rather than sit on it and lead Tarakji to believe the action was completely over. And, even if Rashid's express conduct does not display such an intent, Rashid's actions in re-filing an identical action rather than disputing any alleged lack of notice prior to the dismissal of his first action shows an implied waiver of a right to contest any such alleged lack of notice. Rashid only disputes notice now because his re-filed action was dismissed. This waiver and the concomitant failure to timely challenge the dismissal compel affirmation of the Circuit Court's decision to deny Rashid's Motion to Reinstate.

B. Rashid is estopped from challenging the Dismissal Order as Tarakji relied on the Dismissal Order and Rashid's inaction to reinstate.

Rashid's delay in taking any action following the dismissal on July 5, 2001, much less timely moving to reinstate under Rule 41(b), serves as an estoppel of his right to raise issue as to the validity of the Dismissal Order thirteen terms of court, over four years, after the action was dismissed. Rashid argues that the Dismissal Order is void ab initio for lack of notice, but cannot explain away the fact that he failed to timely challenge the dismissal. In the meantime, Tarakji moved on with his practice and his life in reliance on the dismissal since Rashid had not made any move to reinstate. And, now, over ten years have passed since the alleged incidents giving rise to the underlying lawsuit. Tarakji is undoubtedly prejudiced from his reliance on Rashid's failure to timely challenge the validity of the Dismissal Order. Accordingly, Rashid's delay should operate as an estoppel against the assertion of any right to challenge the Dismissal Order and reinstate this action.

"Estoppel applies when a party is induced to act or to refrain from acting to her detriment because of her reasonable reliance on another party's misrepresentation or concealment of a material fact." Syl. Pt. 3, Bradley v. Williams, 195 W.Va. 180, 465 S.E.2d 180 (1995) (internal citations omitted). More specifically, "[w]here a party knows his rights or is cognizant of his interest in a particular subject-matter, but takes no steps to enforce the same until the condition of the other party has, in good faith, become so changed, that he cannot be restored to his former state if the right be then enforced, delay becomes inequitable, and operates as an estoppel against the assertion of the right." Syl. Pt. 3, State ex rel. Young v. Prichard, 208 W.Va. 762, 542 S.E.2d 925 (2000) (internal citations omitted). See e.g., Crowley v. Krylon Diversified Brands, 216 W.Va. 408, 412, 607 S.E.2d 514, 518 (2004) (holding in dicta that corporation's failure to follow statutory requirement of maintained a listed agent for service of process through Secretary of

State's office should be estopped from asserting insufficiency of process, the statute of limitations, or other defense arising from insufficient process). "When a court of equity sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief." Id.

Rashid argues that the Dismissal Order is void ab initio for lack of notice. The Dismissal Order was entered on July 5, 2001 and one of Rashid's counsel admits that he received the Dismissal Order on July 20, 2001 – well within three terms of court to challenge any lack of notice or the validity of the Dismissal Order in general. However, Rashid waited thirteen terms of court, over four years, after the Dismissal Order was entered before challenging the alleged lack of notice despite the fact that he was aware of this issue two weeks after the Dismissal Order was entered. Moreover, rather than initially challenge the validity of the Dismissal Order, Rashid allowed nine terms of court, three years, to pass before re-filing the lawsuit in March 2005. In the interim, Tarakji believed the lawsuit over and moved on with his practice and his life under the belief that the threat of litigation from Rashid no longer hung over his and his family's heads. Furthermore, it is inequitable and completely adverse to logic that a plaintiff should be able to sit on his or her rights to the detriment of a defendant who will bear the threat of litigation with no foreseeable end. As such, Rashid's delay in moving to reinstate this case has become inequitable and should operate as an estoppel against the assertion of any such right.

III. THE CIRCUIT COURT CORRECTLY DENIED RASHID'S MOTION TO REINSTATE, WHICH WAS FILED THIRTEEN TERMS OF COURT AFTER THE DISMISSAL OF THE UNDERLYING ACTION.

Having failed to timely challenge the Dismissal Order, Rashid resorted to relying on Arlan's Dept. Store of Huntington, Inc. v. Conaty, 162 W.Va. 893, 253 S.E.2d 522 (1979), to file his Motion to Reinstate beyond three terms of court after his action was dismissed. The Circuit Court properly denied Rashid's motion for failure to show "good cause" – a decision consistent

with the fact that this Court has never reinstated an action under Rule 41(b) after more than three terms of court have lapsed.

A. Rashid failed to prove "good cause" to justify reinstatement of his action thirteen terms of court after it was dismissed by the Circuit Court under Rule 41(b).

Rashid's original action, filed on March 14, 1997, was dismissed by the Circuit Court on July 5, 2001 for failure to remit the court's fee to maintain the action on its docket. Despite becoming aware of the dismissal within weeks of the entry of the Dismissal Order, Rashid did not file his Motion to Reinstate until *twenty-six* terms of court after the action was filed, *thirteen* terms of court after the action was dismissed, and *two* additional terms of court after Tarakji filed a motion to dismiss an identical action filed by Rashid to circumvent the dismissal of the original action. Moreover, for the first time in his Motion to Reinstate, Rashid alleged that he did not receive notice of dismissal prior to entry of the Dismissal Order. As Rashid failed to promptly move for reinstatement, the Circuit Court correctly denied Rashid's Motion to Reinstate the original action pursuant to Rule 41(b), which provides, in relevant part:

> **(b) Involuntary Dismissal; Effect Thereof.**
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> Any court in which is pending an action wherein for more than one year there has been no order or proceeding, or wherein the plaintiff is delinquent in the payment of accrued court costs, may, in its discretion, order such action to be struck from its docket; and it shall thereby be discontinued. The court may direct that such order be published in such newspaper as the court may name. The court may, on motion, reinstate on its trial docket any action dismissed under this rule, and set aside any nonsuit that may be entered by reason of the nonappearance of the plaintiff, within three terms after entry of the order of dismissal or nonsuit; but an order of reinstatement shall not be entered until the accrued costs are paid.

> Before a court may dismiss an action under Rule 41(b), notice and an opportunity to be heard must be given to all parties of record.

W.Va.R.Civ.P. 41(b) (2006).

Rule 41(b) permits West Virginia courts to strike actions from their dockets where the plaintiff is delinquent in the payment of accrued court costs. Id. A plaintiff is afforded three terms of court following the dismissal to move to reinstate the action. Id. A court is without jurisdiction to act after the three terms of court have lapsed since the dismissal. However, in Arlan's, this Court recognized a limited exception to the three term limit if the parties consent to reinstatement, or if "good cause" is shown such as fraud, accident, or mistake. Syl. Pt. 1, Arlan's, 253 W.Va. 893, 253 S.E.2d 522. In his Motion to Reinstate, Rashid attempted to avail himself of this limited exception through numerous self-serving affidavits that pointed fingers at the Circuit Court, Tarakji, and his own counsel for allowing thirteen terms of court to pass before the Motion to Reinstate was filed. This finger-pointing continued in the brief of Appellant. One of Rashid's counsel, Segal, similarly tried to absolve his own neglect of this case by asserting that he was never really Rashid's counsel in this action, despite being listed as counsel of record since the filing of this action in 1997, but merely trial counsel to be utilized in case the action did not settle. And, again, Rashid attempts to further separate Segal in an attempt to excuse his neglect in this appeal. Id. However, as the record of the action and exhibits attached to Rashid's Motion to Reinstate clearly showed, the dismissal of the action was the result of neglect and negligence which did not amount to the "good cause" required to reinstate the action thirteen terms of court after it was dismissed.

This Court has yet to find a set of circumstances sufficient to give rise to the "good cause" exception to the three term limit set by Rule 41(b). In fact, this Court recently affirmed a

circuit court's denial of a motion to reinstate filed over three terms of court following the dismissal of an underlying action in Tolliver v. Maxey, 218 W.Va. 419, 624 S.E.2d 856 (2005), a case with a similar factual scenario. In Tolliver, this Court affirmed the circuit court's denial of the plaintiffs' motion to reinstate their action twelve terms of court after the case was dismissed under Rule 41(b). The plaintiffs, like Rashid, attempted to argue that their dismissal fell within Arlan's "good cause" exception since previous counsel neglected the case and allowed the three term limit to expire. The plaintiffs also argued "good cause" since their new counsel, retained eight terms after the Rule 41(b) dismissal, waited four additional terms of court after her retention before motioning to reinstate the action, claiming that she was unaware of the "good cause" exception. In the interim, the plaintiffs' new counsel filed a legal malpractice action against previous counsel as new counsel believed that the legal malpractice action was the only option.

This Court agreed with the circuit court in Tolliver that the fact that new counsel was unaware of the "good cause" exception for an additional four terms of courts after learning of the Rule 41(b) dismissal did not constitute fraud, accident, or mistake required to show "good cause" for reinstatement after three terms of court under Arlan's. Id. at 862. In so holding, this Court distinguished its ruling in Covington v. Smith, 213 W.Va. 309, 582 S.E.2d 756 (2003), in which the Court reversed the circuit court's denial of a plaintiff's motion to reinstate sought *within three terms of court* after dismissal of the action. Id. at 860-861. In Covington, this Court reversed the circuit court's denial of the plaintiff's motion to reinstate, filed within three terms of court after dismissal, after finding that the misconduct of the prior attorney and the attempts of the plaintiff to monitor the action constituted sufficient "good cause" for reinstatement. Id. at 861. This Court defined "good cause" for reinstatement within three terms of court after

dismissal as "[that] which adequately excuses [the plaintiff's] neglect in prosecution of the case." Covington at Syl. Pt. 1 (quoting Syl. Pt. 1, Brent v. Bd. of Trustees of Davis & Elkins College, 173 W.Va. 96, 311 S.E.2d 153 (1983)) quoted in Id. However, in Tolliver, this Court noted that the definition of "good cause" in Covington was not directly applicable since the plaintiff's motion to reinstate was not timely filed in Tolliver as in Covington. Therefore, Arlan's definition of "good cause" as fraud, accident, or mistake, applicable after three terms of court have passed since dismissal, applied in Tolliver as opposed to Covington's more lenient "good cause" standard applicable within three terms of court after dismissal. Accordingly, this Court concluded that "it would expand the exception to the three term limit under Arlan's too far" to apply it in the circumstances presented by Tolliver since new counsel's actions did not arise to the level of fraud, accident, or mistake. Id.

Other cases demonstrate that this Court has yet to find "good cause" sufficient to allow the reinstatement of a dismissed action after more than three terms of court have lapsed. For example, in Rollyson v. Rader, 192 W.Va. 300, 452 S.E.2d 391 (1994), this Court held that a circuit court erroneously reinstated a case twenty-seven terms of court after dismissal. In so holding, this Court determined that the failure of the plaintiffs' former counsel to inform the plaintiffs that the case had been dismissed and the failure of the plaintiffs' new counsel to move to reinstate the action for an additional six terms of court after taking the case did not constitute "good cause" to reinstate the case under Arlan's. Id. at 394, 303. This Court noted that the sometimes harsh result of Arlan's is curbed by the fact that a plaintiff is provided ample opportunity to move to reinstate their action under Rule 41(b).

In Taylor v. Smith, 171 W.Va. 665, 301 S.E.2d 621 (1983), this Court affirmed a circuit court's denial of the plaintiff's motion to reinstate filed over three terms of court after dismissal

and two and one-half years after counsel obtained the case. The plaintiff argued that Arlan's abrogated the three term limit thereby allowing him to move to reinstate over three terms of court after the dismissal as long as he moved to reinstate with reasonable promptness. Id. at 667, 624. This Court disagreed and stated that a showing of fraud, accident or mistake is required for reinstatement under Arlan's. Id. The plaintiff sleeping on his rights did not fulfill the Arlan's standard.

It is significant to note that every case in which this Court permitted reinstatement of an action following a Rule 41 dismissal have involved situations where the reinstatement was timely sought within three terms of court following the dismissal. For example, in Belington Bank v. The Masketeers Co., 185 W.Va. 564, 408 S.E.2d 316 (1991), this Court reversed a circuit court's denial of the plaintiff's motion for reinstatement, *sought within three terms of court after dismissal*, since the failure to prosecute was the result of an automatic bankruptcy stay and the circuit court abused its discretion in dismissing the case. In Evans v. Gogo, 185 W.Va. 357, 407 S.E.2d 361 (1990), this Court allowed reinstatement, *sought two days after dismissal*, after taking into consideration that the delay in prosecution was the result of change in out-of-state counsel, information and records prosecuted by the plaintiffs' counsel indicated that work was being done on the case, and an expert witness had been contacted. Finally, in Covington, this Court reversed a circuit court's denial of the plaintiff's motion for reinstatement, *sought within three terms of court after dismissal*, upon the plaintiff's showing of extreme attorney neglect and diligence by the plaintiff to monitor his case.

However, it should also be noted that this Court does not always allow reinstatement even when the motion is filed within three terms of court following dismissal under Rule 41(b). For example, in Frazier v. Pioneer Chevrolet-Cadillac, Inc., 192 W.Va. 468, 452 S.E.2d 926

(1994), this Court affirmed a circuit court's denial of the plaintiff's motion to vacate a dismissal for failure to prosecute as the plaintiff failed to show "good cause" for reinstatement. The plaintiff alleged that his former counsel did not prosecute the case because counsel was awaiting word from the defendant's counsel that a concurrent insurance coverage action between the defendant and its insurance company had been resolved. Id. at 470, 928. In the interim, the circuit court dismissed the case for failure to prosecute. This Court held that the plaintiff's waiting for word from the defendant's counsel to prosecute the action was not "good cause" as there was no reason why the plaintiff could not have gone forward with the case. Id. at 471, 929. Moreover, the plaintiff could have determined the status of the coverage action himself rather than waiting for word from the defendant's counsel that the coverage action was over. Accordingly, reinstatement within three terms of court following dismissal is not automatic.

Rashid argues that "good cause" existed to grant his Motion to Reinstate his action thirteen terms of court after it was dismissed based upon "(1) mistake in the form of negligence (or perhaps impairment) on the part of Dr. Rashid's former counsel, Bradley Sorrells[.]"[2] Brief of Appellant at p. 15. Rashid specifically asserts that Sorrells' alleged negligence falls within the "good cause" exception since "... Sorrels [sic] was at the very least negligent in failing to appreciate that even though there was a ten year statute of limitation, such dismissal order operated as an adjudication upon the merits, and that the only means of reviving the cause of action was to seek reinstatement within three terms after entry of the dismissal order." Id. at p. 15-16. Rashid further argues that "... Sorrels [sic] was possibly working under the misapprehension that because the Order made reference to the opportunity to seek reinstatement, which is otherwise provided in Rule 41(b), the dismissal did not operate as an adjudication upon the merits." Id. at p. 16. However, this Court's holding in Tolliver speaks exactly to this point

[2] Rashid submitted no evidence of impairment on the part of Sorrells.

by holding that the inadvertence or ignorance of counsel as to the law does not constitute "good cause" sufficient to overcome the three term limit. See Tolliver, 218 W.Va. 419, 624 S.E.2d at 862. Covington, which addressed a motion to reinstate *timely* filed within three terms of court after dismissal, is clearly inapplicable due to the extreme length of time that elapsed between the dismissal and Rashid's filing of the Motion to Reinstate.

Sorrells' alleged unawareness of the "good cause" exception to the three term limit and subsequent re-filing of this case rather than moving to reinstate is not "good cause" as contemplated by either the Supreme Court of Appeals in Arlan's or Tolliver. Rather, "counsel is presumed to know the provisions of the rules of civil procedure." Taylor, 171 W.Va. 665, 301 S.E.2d 621 cited in Brent, 173 W.Va. at 40, 311 S.E.2d at 157. As this Court notes,

> Arlan's provides no excuse for [counsel's] failure to promptly move for reinstatement. The concepts enunciated in Arlan's were foreseeable. Counsel should have filed a reinstatement motion within a reasonable time after discovery of the dismissal order, or availed himself of the escape hatch of Rule 60(b), contending the dismissal order was void for lack of notice. He took neither course of action. Neither can we ignore the fact that reinstatement would deny defendants the benefit of the statute of limitations. The law aids those who are diligent, not those who sleep upon their rights.

Taylor, 171 W.Va. at 667, 301 S.E.2d at 624. Neither Sorrells nor Segal did either. As in Tolliver, and as recognized by the Circuit Court, reinstating Rashid's action after such negligence and neglect on behalf of Sorrells and/or Segal would "expand the exception to the three term limit under Arlan's too far to apply it in these circumstances." Id. The "good cause" exception was not intended to reinstate cases where counsel was ignorant as to the rules of civil procedure or slept on their rights, but rather extreme circumstances.

Rashid argued in the Motion to Reinstate and now in this appeal that "[t]he failure of Mr. Sorrells to discuss with his client [Rashid] the potential impact of the dismissal on the viability of

any future action amounts not only to negligence, but to the sort of 'positive misconduct' justifying the Court undertaking to remedy the harm that would otherwise be done to Dr. Rashid." Brief of Appellant at p. 17; Motion to Reinstate, Memorandum at p. 10. However, Sorrells' ignorance of the law not only fails to fulfill the "good cause" standard to reinstate within three terms of court after dismissal, but also the heightened standard to reinstate over three terms of court after dismissal. While Rashid's quoting of Justice Starcher's concurring opinion regarding "positive misconduct" in Covington is enlightening, it does not overcome Tolliver's holding that counsel's unawareness of Arlan's exception to the three term rule does not itself fall within the description of "good cause" in Arlan's as including fraud, accident or mistake. Tolliver, 218 W.Va. 419, 624 S.E.2d at 862. Moreover, "establishing good cause 'puts the burden on the party seeking relief to show some *plainly adequate* reason therefore,' not merely *any reason*." AT&T Comm. of W.Va., Inc. v. Public Serv. Comm'n of W. Va., 188 W.Va. 250, 253, 423 S.E.2d 859, 862 (1992) quoted in Covington, 213 W.Va. at 322, 582 S.E.2d at 769. "'[G]ood cause can only appear by showing ... some ... circumstance beyond control of the party and free from neglect on his part.'" Winonoa Nat'l Bank v. Fridley, 122 W.Va. 479, 481, 10 S.E.2d 907, 908 (1940) quoted in Covington, Id.

Instead of demonstrating "good cause," Rashid submitted his own affidavit, which clearly reflected that he was aware of the dismissal and that Sorrells had an intended plan of action. In lieu of objecting to the dismissal, Sorrells and Rashid choose to re-file the case. Rashid does not allege that Sorrells evaded him either throughout the tenure of this case, the dismissal, or after. Moreover, Rashid attempts to place blame on Tarakji for the failure of this case to move forward resulting in the dismissal. Brief of Appellant at p. 16; Motion to Reinstate, Memorandum at p. 4. However, it is not Tarakji's responsibility to monitor Rashid's case for him and ensure that

Rashid is prosecuting timely. In fact, Tarakji's counsel informed Sorrells of his erroneous interpretation of Rule 41(b), but Rashid and Sorrells still failed to move for reinstatement. Correspondence, January 31, 2003, Jeffrey Wakefield to Bradley Sorrells, attached to Tarakji's Response to Rashid's Motion to Reinstate as Defendant's Exhibit D. This neglect on behalf of Sorrells and Rashid is not a mistake under the "good cause" standard set by Arlan's.

Accordingly, the Circuit Court properly held that Sorrells re-filing of the action rather than moving to reinstate within three terms of courts did not constitute "good cause" sufficient to overcome the dismissal. Sorrells' conduct falls into the realm of neglect and negligence, which is insufficient to reinstate for good cause under Arlan's, as contemplated by Tolliver v. Maxey, Rollyson v. Rader, and Taylor v. Smith. Moreover, Sorrells' conduct would not even fulfill the "good cause" standard to reinstate within three terms of court after dismissal as contemplated by Frazier v. Pioneer Chevrolet-Cadillac, Inc., Belington Bank v. The Masketeers Co., Evans v. Gogo, and Covington v. Smith. If Rashid is allowed to reinstate his action under these circumstances, then what case will ever be subject to the three term limit? The three term limit will be virtually meaningless. Therefore, as Rashid failed to show "good cause" excusing his neglect in moving to reinstate the action within three terms of court following the dismissal, the Circuit Court correctly denied Rashid's Motion to Reinstate.

B. Any alleged lack of notice is not "good cause" to reinstate Rashid's action.

From his Motion to Reinstate extending to this appeal, Rashid has maintained a contrary position with regard to the involvement of Segal as co-counsel in this case. On one hand, Rashid argues that any neglect of Segal is irrelevant since Segal was simply hired as "an experienced trial attorney ... [with] limited responsibility of trying the case to a jury if the matter could not be resolved by settlement." Brief of Appellant at p. 3. On the other hand, Rashid asserts that the

Circuit Court's denial of his Motion to Reinstate is invalid since Segal allegedly did not receive notice of the dismissal or a hearing prior to the entry of the dismissal order. Id. at p. 10. Besides the fact that Segal is listed as counsel of record on the docket, any alleged insufficiency of notice does not excuse the fact that Segal did not move to reinstate the case within three terms of courts after he received the dismissal order on July 20, 2001.

Even if the Circuit Court were to excuse the neglect of Sorrells, Sorrells' co-counsel, Segal, was still aware of the dismissal in July 2001 and failed to file a motion to reinstate this case within three terms of courts or ensure that Sorrells was filing a motion. Brief of Appellant at p. 5-6; Segal Affidavit, attached to Rashid's Motion to Reinstate as Exhibit E. Rather, Segal admitted that he neglected the underlying action for four years:

> 8. Upon receiving this Court's Order and the Clerk's March 30, 2001 letter, I immediately requested Mark R. Staun, an attorney practicing with me at The Segal law Firm, to contact Mr. Sorrells and find out what was going on with the $20.00 fee and the Court's Dismissal.
>
> 9. It is my understanding that Mr. Staun immediately contacted Mr. Sorrells regarding this matter. Mr. Staun reported back to me that Mr. Sorrells was going to take care of the matter.
>
> 10. On or about March 21, 2005, Mr. Sorrells filed Civil Action No. 05-C-597 in the Circuit Court of Kanawha County, West Virginia. The allegations set forth in the Complaint are identical to the allegations set forth in Civil Action No. 97-C-725.

Id.

Segal and his legal assistant, Earlena G. Titta, attempt to compensate for this neglect and overcome the dismissal by swearing that the notice letter dated March 30, 2001, was not delivered to Mr. Segal until July 18, 2001.[3] Brief of Appellant at p. 5-6. However, the docket

[3] Tarakji moved to strike the affidavit of Titta as it contained impermissible hearsay evidence. However, the Circuit Court denied Rashid's Motion to Reinstate before ruling on Tarakji's motion.

sheet speaks to the contrary. Docket Sheet, attached to Tarakji's Response to Rashid's Motion to Reinstate as Defendant's Exhibit I. The docket sheet not only identified Segal as counsel for Rashid, but also notes that the notice letter was sent on March 30, 2001. Id. Moreover, according to the Circuit Court Clerk's paper file, identical notice letters were sent on March 30, 2001. The letters put the parties, through counsel, on notice that civil action number 97-C-725 was to be dismissed under Rule 41(b) unless a $20.00 fee was paid to maintain the civil action on the Court's docket by May 1, 2001. Finally, the "Notation of Delivery" attached to the dismissal order states that the dismissal order only was sent to Segal and Wakefield on July 18, 2001. Dismissal Order (7/5/01), attached to Tarakji's Response to Motion to Reinstate as Exhibit B.

The docket shows that the notice was sent regardless of whether the notice letter ultimately made it into the hands of Segal or not. Docket, attached to Tarakji's Response to Motion to Reinstate as Ex. I. But even assuming that Segal did not receive the notice letter, the Circuit Court correctly held that this does not compensate for the fact that Segal was fully aware of the dismissal in July 2001 and failed to challenge his alleged lack of notice in lieu of a message from another attorney at The Segal Law Firm that everything was be "taken care of" by Sorrells. Segal Affidavit, Ex. E. Segal's own neglect of this case and reliance on Sorrells' statements does not justify reinstatement of this case for "good cause" as specifically spoken to in Taylor where this Court denied the plaintiff's motion to reinstate stating that "[c]ounsel should have filed a reinstatement motion within a reasonable time after discovery of the dismissal order, or availed himself of the escape hatch of Rule 60(b), contending the dismissal order was void for lack of notice."[4] Taylor, 171 W.Va. at 667, 301 S.E.2d at 624.

[4] Rashid cites Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp., 843 F.2d 808 (4th Cir. (S.C.) 1988), for the proposition that when a party is blameless, his attorney's negligence qualifies as a mistake or excusable neglect under Rule 60(b)(1) of the Federal Rules of Civil Procedure. Brief of Appellant at p. 16 However, given that West Virginia law speaks directly to Rule 41(b) of the West

Rashid argues that Segal's neglect is not fatal since Segal was not retained to do the day-to-day work on the case, but only to try the case if it proceeded to trial. In support of this assertion, Rashid cites Armor v. Lantz, 207 W.Va. 672, 535 S.E.2d 737 (2000), in which this Court set forth the duties of lawyers acting as *local counsel*. Brief of Appellant at p. 3. However, Armor does not set forth duties with regard to West Virginia co-counsel maintaining a case in West Virginia courts. In this case, Segal's name was included on the Complaint. Segal's name and address were included with Sorrells' on Rashid's answer to Tarakji's counterclaim. Segal is also identified as counsel of record on the Court's file and the court docket. Moreover, Segal's name and signature are included on the re-filed complaint and summons. Finally, Segal responded to Tarakji's motion to dismiss the re-filed complaint.

While Tarakji's discovery correspondence was with Sorrells, the line where Sorrells' responsibility ended and Segal's began is blurry at best. Wherever this line falls, Segal still was aware of the Dismissal Order and any lack of notice, but failed to do anything about it, absent asking another attorney at his firm to call Sorrells about the dismissal. Accordingly, the Circuit Court correctly held that any alleged lack of notice does not justify reinstatement of this case especially in light of Segal's admitted neglect of this case for over four years and failure to move for reinstatement within three terms of court following the entry of the Dismissal Order.

C. Reinstating Rashid's action will prejudice Tarakji.

Rashid argues that reinstatement of this case will not result in any substantial prejudice to Tarakji. Brief of Appellant at p. 16. However, Rashid completely disregards the fact that Tarakji was subject to this litigation for four years before it was dismissed by the Circuit Court in

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Virginia Rules of Civil Procedure, i.e. Tolliver, 218 W.Va. 419, 624 S.E.2d 856 and Taylor, 171 W.Va. 665, 301 S.E.2d 621, Tarakji asserts that West Virginia law governs as opposed to Augusta, which is a Fourth Circuit case out of South Carolina addressing the reconsideration of a default judgment under Rule 60 of the Federal Rules of Civil Procedure.

2001. Despite Tarakji's belief in 2001 that he, his family, and his medical practice were no longer subject to the threat of litigation from Rashid, four years later, in 2005, Tarakji was again subjected to this litigation when Rashid re-filed an identical action. And, even though the re-filed action has been dismissed, Tarakji has been subjected to Rashid's continued attempts to reinstate the original action. Rashid had adequate opportunity to prosecute this case against Tarakji, but either through the inadvertence of counsel or blatant neglect failed to do so.

Not only will reinstatement of this case prejudice Tarakji, but it will also make Rule 41(b) almost meaningless. Reinstatement will allow cases to remain on court dockets unchecked for years and reinstated simply because counsel was not up on the rules of civil procedure or just failed to monitor their cases. However, not only is counsel presumed to be aware of the rules of civil procedure, but plaintiffs have an obligation to monitor their case and move their case to trial. Dimon v. Mansey, 198 W.Va. 40, 45, 479 S.E.2d 339, 344 (1996). Therefore, reinstating this case runs completely contrary to the purpose of Rule 41(b), which is to prevent the clogging of court dockets with unprosecuted cases. Id. The "good faith" exception to Rule 41(b) is reserved for exceptional cases, not cases of negligence and neglect as is evident here. Therefore, the Circuit Court properly denied Rashid's Motion to Reinstate.

IV. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY ENTERING THE ORDER WITHOUT A HEARING.

The Circuit Court did not abuse its discretion in denying Rashid's Motion to Reinstate without a hearing since the Circuit Court held that any alleged failure to receive notice did not overcome Rashid's failure to timely move for reinstatement. Order at pp. 10-11. Moreover, Rashid was heard although the Court did not schedule a hearing on the Motion to Reinstate. In fact, Rashid submitted the Motion to Reinstate along with an accompanying memorandum of law and seventeen (17) exhibits, including five (5) affidavits. And, as a hearing was not scheduled,

the affidavits went un-rebutted by Tarakji. Accordingly, Rashid was given a more than adequate opportunity to be heard and the Circuit Court did not abuse its discretion by dismissing the Motion to Reinstate without a hearing.

Contrary to Rashid's assertion, case law on the issue of "good cause" for reinstatement beyond three terms of court does not make plain that a hearing is required to afford Rashid an opportunity for the development of evidence and proper consideration of the circumstances resulting in the dismissal. In fact, none of these cases stands for this proposition. Covington, acknowledges that a party must be given an opportunity to be heard prior to dismissal, but unless that party seeks a hearing, the court is not required to conduct a hearing and may make a determination based on the record.[5] Syl. Pt. 3, Dimon, 198 W.Va. 40, 479 S.E.2d 339 cited in Covington, 213 W.Va. at 318, 582 S.E.2d at 765. And, while a hearing on motions to reinstate were conducted in Arlan's and Tolliver, neither of these cases stand for the proposition that a hearing must be conducted. Rashid's reliance on these cases for his proposition is unfounded. Moreover, there was no evidence to be adduced. The fact was that any issue regarding any alleged lack of notice was irrelevant since it could not overcome Rashid's failure to timely move for reinstatement.

Although Rashid did not have a formal hearing before the Court, there is no doubt that Rashid was heard. Rashid filed the Motion to Reinstate and developed a record. Rashid does not identify a single fact that he was not given a full opportunity to develop. Rashid also does not identify a single fact that was not considered by the Circuit Court before denying the Motion to Reinstate. In fact, Rashid submitted seventeen (17) exhibits to his Motion to Reinstate

[5] Contrary to Rashid's assertions, Covington does not involve a situation in which a party moved for reinstatement *after three terms of court* following dismissal. Brief of Appellant at p. 18. In Covington, the circuit court entered a dismissal order on November 16, 2000, and the plaintiffs filed a motion to reinstate on June 13, 2001 – the second term of court following the entry of the dismissal order.

including affidavits from Segal, Rashid, Charles Rashid (Rashid's son), Earlena Titta (Segal's legal assistant), and Mark Staun, Esq (an attorney at The Segal Law Firm). Motion to Reinstate at Ex. 1-2, 10, 13-14. If anyone was denied an opportunity to be heard it was Tarakji as the record stood un-rebutted since he did not have an opportunity to cross-examine any of the affiants. Everything was on the record. And, despite everything on the record, Rashid still cannot explain away his failure to move to reinstate the action within three terms of dismissal. Accordingly, the Circuit Court did not abuse its discretion in denying Rashid's Motion to Reinstate without conducting a hearing.

CONCLUSION

For the foregoing reasons, the appellee, Muhib S. Tarakji, M.D., respectfully requests this Honorable Court affirm Circuit Court of Kanawha County's July 5, 2001 dismissal of the underlying case.

MUHIB S. TARAKJI, M.D.,

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CERTIFICATE OF SERVICE

I, Jeffrey M. Wakefield, counsel for defendant, Muhib S. Tarakji, M.D., do hereby certify that "BRIEF OF APPELLEE, MUHIB S. TARAKJI, M.D." was served upon the following counsel of record by placing true and accurate copies thereof in the United States Mail, first class, postage prepaid, this 21st day of November, 2007:

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